STATE OF NEW HAMPSHIRE DEPARTMENT OF STATE

IN THE MATTER OF:))
Local Government Center, Inc.; Government Center Real Estate, Inc.; Local Government Center Health Trust, LLC; Local Government Center Property-Liability Trust, LLC; Health Trust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.; LGC – HT, LLC; Local Government Center Workers' Compensation Trust, LLC; And the following individuals: Maura Carroll; Keith R. Burke; Paul G. Beecher; Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;	Case No: C2011000036 Case No: C201000036
Julia A. Griffin; and John Andrews RESPONDENTS)))

OBJECTION TO RESPONDENT ANDREWS' MOTION TO PRECLUDE LEGAL CONCLUSION TESTIMONY

Petitioner, the Bureau of Securities Regulation (BSR), a part of the Corporations Division within the Department of State, files this Objection to Respondent Andrews' motion to preclude legal conclusion testimony.

1. On January 10, 2012, Respondent John Andrews ("Andrews") filed a pre-emptive motion seeking to exclude certain categories of testimony that Andrews anticipates will be offered by BSR's expert witness, Richard Djokic, despite the fact that Mr. Djokic's expert report is not due for another 4 weeks. Andrews' motion is premature and unnecessary in the context of an administrative hearing before an experienced Presiding Officer as opposed to a trial before a lay jury.

- 2. After briefly touching on the fact that this is an administrative hearing, Andrews focuses his motion on an analysis of cases applying the federal Rules of Evidence, primarily in jury trials. At the outset, it must be made clear that the Rules of Evidence do <u>not</u> apply in this administrative proceeding. Pursuant to R.S.A. 5-B:4-a,VI, "[a]ll hearings shall be conducted in accordance with R.S.A. 421-B:26-a." Further, R.S.A. 421-B:26-a, XX, states unequivocally that "Administrative hearings <u>shall not</u> be bound by common law or statutory rules of evidence" (emphasis supplied). Andrews' reliance on federal court applications of the federal Rules of Evidence is misplaced.
- There is no dispute that evidentiary questions are left to the sound discretion of the Presiding Officer. C.f. Laramie v. Stone, 160 N.H. 419, 429 (2010) ("The admission or exclusion of expert testimony is within the trial court's sound discretion."). Pursuant to R.S.A. 421-B:26-a, XX, all "relevant, material, and reliable evidence shall be admissible." Accordingly, the Presiding Officer may admit evidence that would not be admissible under the rules of evidence in a court of law. See, e.g., Complete General Const. Co. v. Occupational Safety and Health Review Com'n., 53 F.3d 331, 1995 WL 259227, *2 (6th Cir. 1995) ("In administrative adjudications, the administrative law judge may receive evidence that is not admissible in federal court under the Federal Rules of Evidence."). C.f. Bayliss v. Barnhart, 427 F.3d 1211, 1218 n.4 (9th Cir. 2005) ("The Federal Rules of Evidence do not apply to the admission of evidence in Social Security administrative proceedings. See 42 U.S.C. § 405(b)(1); 20 C.F.R. §§ 404.950(c), 416.1450(c) ('The administrative law judge may receive evidence at the hearing even though the evidence would not be admissible in court under the rules of evidence used by the court.')".).
- 4. While federal case law interpreting the Federal Rules of Evidence is not controlling, Courts often uphold the admission of expert testimony related to legal conclusions

where it would be helpful to the trier of fact in understanding complex legal regimes. For example, in *United States v. Offill*, __ F.3d __, 2011 WL 6034788, *5 (4th Cir., Dec. 6, 2011), the Fourth Circuit Court held that the District Court had not abused its discretion in allowing expert testimony on securities concepts, terms, and practices, including detailed hypotheticals that closely resembled the alleged facts in the case. <u>Offill</u>, 2011 WL 6034788 at *3. With regard to expert testimony touching on legal conclusions, the Court stated:

[W]e have also noted that when the legal regime is complex and the judge determines that the witness' testimony would be helpful in explaining it to the jury, the testimony may be admitted. See United States v. Barile, 286 F.3d 749, 760 n. 7 (4th Cir.2002). Indeed, courts and commentators have consistently concluded that expert testimony that ordinarily might be excluded on the ground that it gives legal conclusions may nonetheless be admitted in cases that involve highly technical legal issues. See, e.g., United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir.1991) ("Particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts").

- <u>Id.</u> at *5. The Presiding Officer would be well within his discretion to permit Mr. Djokic to testify, particularly when dealing with the complexities of securities law in an administrative hearing where the evidentiary rules do not apply.
- 5. It is also important to note that there is no jury in this hearing. Unlike the majority of the cases cited by Andrews, there is no concern that expert testimony may improperly influence a lay jury. The Presiding Officer is empowered to "[d]etermine credibility or weight of evidence," and can make his own determination of which expert opinions he will credit. R.S.A. 421-B:26-a, XIV(n). Indeed, the Presiding Officer has the discretion to disregard any expert testimony that he deems inappropriate or unconvincing. Petition of Gilpatric, 138 N.H. 360, 364 (1994) ("[W]e afford the hearings officer discretion to credit or discredit the testimony of expert witnesses."). When no jury is present, Courts have frequently allowed challenged expert testimony to be presented, leaving the ultimate responsibility to the Judge to

decide the law and the facts. See, e.g. Gulf Group General Enterprises, Co. v. United States, 98 Fed.Cl. 639, 643 (2001) ("The court also notes that there will be no jury present. The undersigned is the sole trier of fact and law at the trial level. Therefore, the risks of members of a jury being prejudiced by testimony on inadmissible matters is not present. In a judge only trial, the undersigned is confident of being able to sort through the responsibility not to allow others to render a decision on the court's behalf.").

- 6. Finally, Andrews' attempt to pre-empt Mr. Djokic's testimony before Mr. Djokic has even presented his expert report is unnecessary and premature. There is no need to pre-judge Mr. Djokic's testimony in the abstract. In this non-jury, adjudicative hearing, there will be ample opportunity for Andrews' counsel to object to any testimony offered by Mr. Djokic that Andrews' counsel deems to be inappropriate. And the Presiding Officer can either rule preclude certain testimony at the time of the hearing or decide to hear all testimony and apply the appropriate weight during his deliberations.
- 7. The BSR understands its burden of proof and the Presiding Officer's responsibility as fact finder and arbiter of the law, including interpreter of the securities statute. BSR is on notice of Andrews' concern over legal conclusion testimony. A pre-emptive exclusion of hypothetical testimony in advance of the hearing is unnecessary and would serve no useful purpose.

WHEREFORE, for the foregoing reasons, the Bureau of Securities Regulation respectfully requests that the Presiding Officer deny Respondent Andrews' Motion to Preclude Legal Conclusion Testimony and reserve judgment for the hearing.

Respectfully submitted,

Bureau of Securities Regulation By and Through Their Attorneys, Bernstein, Shur, Sawyer & Nelson, PA

January 20, 2012

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CERTIFICATION OF SERVICE

I, Andru H. Volinsky, hereby certify that a copy of the above pleading was this date, forwarded to Jeffrey D. Spill, Esq., Earle F. Wingate, III, Esq., Kevin B. Moquin, Esq., Eric Forcier, Esq., Adrian S. Larochelle, Esq., William C. Saturley, Esq., Brian M. Quirk, Esq., David I. Frydman, Esq., Michael D. Ramsdell, Esq., Joshua M. Pantesco, Esq., Mark E. Howard, Esq., Jaye L. Rancourt, Esq., and Steven M. Gordon.

Andru H. Volinsky, Esq.